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ADR and a Smile: Neocolonialism and the West's Newest Export in Africa

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ADR and a Smile: Neocolonialism and the West's Newest Export in Africa

Anthony P. Greco*

I. INTRODUCTION

In 1971, Coca-Cola released an advertisement that took America by storm.¹ What was originally a jingle, "I'd Like to Teach the World to Sing," reached number seven on the *Billboard Hot 100 Music Charts*,² and the images of faces from around the globe, standing together "in perfect harmony" while holding Coca-Cola bottles, brought smiles to millions.³ However, not everyone bought into the pleasant unity Coca-Cola claimed to promote. After World War II, the growing presence of American businesses and products around the world brought about the term *cocacolonization*—a word used to describe what seemed to be the inexorable extinguishment of local, indigenous cultures for a global one dominated by the West, and particularly the United States.⁴

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1. Library of Congress American Memories: The "Hilltop" Ad, <http://memory.loc.gov/ammem/ccmphtml/colaadv.html#success> (last visited Mar. 29, 2010).

2. I'd Like to Teach the World to Sing, Billboard Hot 100, <http://www.billboard.com> (search "I'd Like to Teach the World to Sing" on the Billboard home page for a listing of the song's peak position) (last visited Jan. 2, 2009).

3. See The "Hilltop" Ad, *supra* note 1.

4. Cocacolonization definition, MSN Encarta, http://encarta.msn.com/dictionary_701705147/cocacolonization.html (last visited Mar. 29, 2010). For a more in-depth discussion of cocacolonization and attitudes toward it post World War II, see Richard F. Kuisel, *Coca-Cola and the Cold War: The French Face Americanization, 1948-53*, FRENCH HIST. STUD. 96-116 (1991).

The concept of cocacolonization is similar to the more academic notion of neocolonialism. With the fading of great imperial powers during the early to mid-twentieth century came political independence to former colonies, whose statehood was either fought for or peaceably granted by the former colonizing nation.⁵ However, the theory of neocolonialism, the “final and possibly most dangerous last stage of imperialism,” is that these newly independent nation-states remained under the control of more powerful, external forces, typically through economic or monetary means.⁶ In this way, “foreign capital is used for the exploitation rather than for the development of the less developed parts of the world . . . neo-colonialism increases rather than decreases the gap between the rich and the poor.”⁷ The argument, therefore, is that putting a Coke in every child’s hand served not to unite him with his brothers across the oceans, or to help him “teach the world to sing,” but to line the pockets of Americans producing Coca-Cola.

While the ills of the West’s corporatization of the world have long been debated and catalogued, often neglected is the role the law plays in empowering the rich, disenfranchising the poor,⁸ and serving as the “handmaiden to empire.”⁹ Since what has been termed the “rule of law revival,” which saw its genesis sometime in the late 1980s, the adoption of Western legal frameworks to help developing and Third World nations transition and gain access to the ever growing global market has become commonplace.¹⁰ With the coming of the Alternative Dispute Resolution (ADR) revolution during the last few decades, the West has also begun to export its newest “soft technology,” a form of conflict resolution purportedly based on a “harmon[ic]” as opposed to an “adversarial” approach.¹¹ The question is whether this is really a new product which will promote greater access to justice, or whether this is something more akin to a soft drink company whose vending machines now carry bottled water alongside their familiar carbonated beverages. Is it just a new product in the same corporate machine?

5. See KWAME NKUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* ix-xx (International Publishers 1966). Nkrumah discusses generally the aspects of neocolonialist systems, and the various means by which they are established not just in Africa, but around the globe. *Id.*

6. *Id.* at ix-x.

7. *Id.* at x.

8. See Laura Nader, *Globalization of Law: ADR as “Soft” Technology*, 93 AM. SOC’Y INT’L L. PROC. 304, 304 (1999).

9. *Id.*

10. Julie Paquin, *Cross-Cultural Business Law Transplants: The Neglected Issue of the “Fit”*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 331, 331 (2008).

11. Nader, *supra* note 8, at 304-05.

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Part II of this article will discuss the significance and application of rule of law doctrine and methods of legal reform implemented in developing nations. It will debate some of their positives and negatives, as well as their relationship to the idea of neocolonialism. Part III will describe the exportation of ADR and its interweaving into developing legal systems. As Africa has often been at the forefront of discussions regarding neocolonialism,¹² Part IV will seek to analyze the implementation of a “multi-door” courthouse in Uganda’s Commercial High Court—one which seeks to integrate mandatory mediation with an adopted common law tradition—and how its development was influenced by Western theories of legal reform. It will evaluate the successes and failures of these reforms by judging them on their overarching goals, methods, and results. It will further discuss the use of Local Council Courts (LCCs) as a form of “grass roots” justice in Uganda, and compare the potential gains and losses of both systems. Part V will explore the need for synthesis between modern legal reform, ADR, and customary forms of justice by enacting a small claims procedure, allowing for a uniquely Ugandan rule of law, and creating a cohesive system of justice in the commercial realm. Part VI will conclude this article.

II. LEGAL REFORM AND RULE OF LAW

A. *The Argument for Reform and Legal Transplants*

Before there can be alternative methods of dispute resolution, there must necessarily be an original form.¹³ In 1989, the World Bank released a report finding that the slow rate of development in Sub-Saharan Africa was largely attributable to a “crisis of [good] governance.”¹⁴ Consequently, at a conference just three years later it declared that “good governance is central to creating . . . an environment which fosters strong and equitable development, and [] is an essential complement to sound economic

12. NKRUMAH, *supra* note 5, at 1 (noting that “Africa is a paradox which illustrates and highlights neo-colonialism”).

13. Laura Nader & Elisabetta Grande, *Current Illusions and Delusions About Conflict Management—in Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 590 (2002) (noting that “unless the force or a just law is available as a last resort” parties will not be motivated on their own to “move toward an outcome”).

14. Paquin, *supra* note 10, at 331 n.1.

policies.”¹⁵ Since this time development programs in the Third World have favored what has come to be called the “good governance approach,” which brings with it the adoption of laws based on Western legal models as “a prerequisite to economic development.”¹⁶ The logic behind the theory is relatively simple: that the adoption of efficient and proven laws set up in other economic systems will more quickly integrate societies into the global marketplace and allow for their own development and growth. The two alternatives seem to be the drawn out process of indigenous legal development, or adaptation of the current informal institutions and methods of transaction into a formalized, homegrown source of law.¹⁷

Rule of law theory can be described as a holistic approach to social reform by encouraging a legal system which promotes respect for the law, and the establishment of legal institutions that perform crucial social functions in a healthy state.¹⁸ From an economic standpoint, some rule of law scholars posit that informal methods of doing business are largely based on the current existence of “bad law,” which after “rational evaluation of the costs and benefits of entering the legal system[.]” encourages parties to essentially take matters into their own hands.¹⁹ Basically, with a better rule of law, there would be no need for such activity.²⁰ Naturally, the better rule of law is often assumed to be one based in the time-tested, Western capitalist system.

The World Bank has held that in spite of “academic debate” over the subject, the transplantation of laws and institutions from one culture to another is preferable to those that are homegrown, whether they are independently developing, or from the formalization of current informal institutions.²¹ There are multiple reasons why they are preferable, most of which deal with the much larger notion of accelerating under developed economies’ entrance onto the world stage.²²

15. *Id.*

16. *Id.* at 331.

17. *Id.* at 337-38 (discussing HERNANDO DE SOTO THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 185 (1989)). Hernando de Soto is a Peruvian economist, whose work focuses on informal economic systems in developing nations, such as his native Peru. *Id.*

18. See Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 912-13 (2008) (discussing rule-of-law optimists).

19. Paquin, *supra* note 10, at 337-38.

20. *Id.* at 338.

21. *Id.* at 339.

22. *Id.* at 339-40. Paquin notes that:

The context of globalization also provides powerful incentives for legal harmonization. The new development agenda, which focuses on private entrepreneurs as development vectors, sees growth as deriving from trade and private investment The objective is

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First, creating laws “from scratch” necessitates a kind of skill in drafting and knowledge that “is often in short supply” in developing systems.²³ Put simply, where there are a limited number of legal minds to create comprehensive “good” laws, it is better to adopt a rule of law from somewhere else.²⁴ Furthermore, familiar laws encourage foreign investment.²⁵ Customized laws cause producers to alter products and limit the ability of their delivery into a new system.²⁶ This runs the risk of driving up costs, and generally discouraging investment.²⁷ Additionally, the proper setup of efficient legal institutions provides a backdrop against which the particular economy of the developing nation can flourish; this then allows individuals to participate democratically in the market and exercise their economic rights, furthering the growth of the entire nation.²⁸ Lastly, a well-defined rule of law under good governance is thought to help limit the ability of outside influences from abusing an economic market in which there is a less standardized form of regulation.²⁹ In effect, by transplanting legal models from developed countries to developing nations, it gives them protection against abuse and the continuing impact of neocolonialism.

the creation of bigger, and thus more attractive, markets in which foreign investors can do business efficiently and with minimal “legal barriers.”

Id.

23. *Id.* at 339.

24. *Id.*

25. *Id.*

26. *Id.* (“‘Customization’ of laws to varying local conditions is likely to make international trade more costly by forcing producers to customize their products for each market and increasing the costs incurred by foreign firms in the evaluation of different investment locations . . .”).

27. *Id.* at 339-40.

28. Joel M. Ngugi, *Policing Neo-liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT’L ECON. L. 513, 516-17 (2005) (noting that one of the articulated goals of rule of law reforms is “that of democratizing political and economic decision making”).

29. See Giles Mohan & Jeremy Holland, *Human Rights & Development in Africa: Moral Intrusion or Empowering Opportunities?*, 88 REV. AFR. POL. ECON. 177 (2001). Mohan and Holland state that “capital regime shopping for best conditions encourages governments to lower standards of labour rights and labour protection.” Presumably, Western legal models would prevent states from creating such abuses to the same extent that it prevents them in their current systems.

B. Problems with the Reality of Legal Reform

Despite the most “optimistic”³⁰ outlook and positive predictions of what the importation of foreign understandings of law and legal transplants might bring in helping develop a society and establish an effectively governed economy, the fact is that such attempts have been largely unsuccessful.³¹ Possible explanations point to fundamental flaws in the very theory that legal reform can be implemented in developing nations from top to bottom.

The attempt at such legal reform can be seen as a continuation of flawed concepts dating back to the Age of Imperialism.³² When a select few nations of Europe began dividing up and colonizing parts of the globe, they saw the indigenous peoples of these new territories as inferior to themselves due to racial or cultural characteristics, hindering them from following the same developmental stages of their colonizers.³³ These ideas continued to a certain degree during decolonization—that somehow a “cultural transformation” was needed for native peoples “to jump back into the tracks of history.”³⁴

In order to “jump back,” the expectation is that the same transition into modern law which occurred from “endogenous changes” within developed countries can be effectuated by “exogenous stimuli.”³⁵ In other words, what took hundreds of years to occur to create Western legal models spurred on by internal forces can be accomplished by the “diffusion of capital, institutions, and values from the First World” into the Third.³⁶ The inherent problem is that the legal concepts attempting to be transplanted into these societies may only be understood in reference to other legal notions which are not grasped by the receiving people.³⁷ Without an understanding by

30. See Davis & Trebilcock, *supra* note 18, at 902-05.

31. Paquin, *supra* note 10, at 339.

32. *Id.* at 346.

33. *Id.*

34. *Id.*

35. Davis & Trebilcock, *supra* note 18, at 900.

36. *Id.*

37. *Id.* at 904. As examples of the kinds of legal concepts which are needed to be accepted by any receiving system, Davis and Trebilcock state:

[C]ore priorities should attach to well-defined and alienable private property rights; a formal system of contract law that facilitates impersonal contracting; a corporate law regime that facilitates the capital investment function through ease of incorporation and limited liability of small and medium sized enterprises and minimizes agency costs faced by shareholders in general in the case of non-owner managed firms or by minority shareholders in firms with controlling shareholders; a system of secured lending that makes it easy for creditors to take a broad range of assets as collateral, identify competing claims to those assets, and seize and sell the assets in the event of default; a bankruptcy

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legal professionals, the institutions being put in place, and perhaps most importantly, by the population at large, it is difficult for relatively new concepts to take root without some point of bearing.³⁸ The truth is that “not even the world best practice solutions will work if the society will resist them or ignore them.”³⁹

For the transplantation of models to take hold requires a broad stroke accompanied by acceptance and comprehension. This has been called both “ethnocentric and naïve” by some scholars, particularly in reference to the establishment of American liberal legalism abroad.⁴⁰ Over the years there has been an ever growing acceptance that culture plays a far larger role than previously thought in the ability of other populations to accept and take ownership of legal concepts that are not indigenous.⁴¹ A major critique centers upon the idea that the drive for “marketisation,” in the hopes that economic development will bring greater personal involvement, has neglected the issue of its impact socially and politically.⁴² Particularly when it comes to commercial law transplants, it has to be wondered who is benefiting if a large portion of the population has limited access to the

regime that induces the exit of inefficient firms and redeployment of their assets to higher-valued uses; and a non-punitive, non-distortionary tax regime.”

Id. at 903.

38. *Id.* at 904.

39. *Id.* at 905.

40. *Id.* at 916. The authors go on to write that:

Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.

Id. (quoting David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062, 1075-76 (1974)).

41. Paquin, *supra* note 10, at 347-48.

42. Mohan & Holland, *supra* note 29.

system in which they are being implemented.⁴³ The holistic approach to the rule of law revival proposes that the across-the-board Westernization of law is the solution, but it is debatable whether these ideals constitute something “universal, attainable by all peoples and cultures,” or work as “Western impositions of a neocolonial character.”⁴⁴ Specifically, if there is “no alternative to the promotion of cultural change to foster economic development in places where cultural values are ‘fundamental obstacles to progress,’” then cultural change must be effectuated to push the economy and market of Third World and underdeveloped nations forward into modernity.⁴⁵ The possibility that this one world legal culture, which adjusts the conditions and composition of legal structures in the Third World to fit a “modernized” norm created by Western powers from which they are the primary beneficiaries, falls in line with the general understanding of a neocolonialist system.⁴⁶

III. ALTERNATIVE DISPUTE RESOLUTION

A. *The Hopes for ADR and Criticism in Developing Systems*

With it being apparent that a degree of cultural change is often necessary to promote the modernization of developing legal systems, and that the formalized institutions and transplanted law set up by legal reform are often rejected in favor of more traditional ways of doing business, it becomes clear that some kind of transitional structure should be put in place to encourage cultural acceptance. The solution proposed in many instances is an overall implementation of alternative dispute resolution mechanisms that will work on a level that is more “harmonic” and “informal,” as opposed to the expectation that a hard line reform of “better law” would naturally take hold.⁴⁷ The implementation of ADR procedures is usually seen as less abrasive and more “benign.”⁴⁸ Furthermore, the general belief has been that

43. See Davis & Trebilcock, *supra* note 18, at 918 (“[S]ome legal reforms are prompted by foreign actors attempting to promote their own interests in matters such as global security or exporting particular values as opposed to helping poor countries develop.”).

44. Paquin, *supra* note 10, at 347-48.

45. *Id.* at 347 (quoting Lawrence E. Harrison, *Why Culture Matters*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS*, at xxxi (Lawrence E. Harrison & Samuel P. Huntington eds., 2000)).

46. See *supra* Part I for a basic description of the concept of neocolonialism and the theories of its development and impact. See generally Nkmurah, *supra* note 5.

47. See Nader, *supra* note 8, at 304-05.

48. *Id.* at 305.

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underdeveloped societies typically lend themselves to a kind of dispute resolution that is more informal and less adversarial than the methods attempting to be implemented based on Western-style court systems.⁴⁹ The use of ADR mechanisms still serves the same purpose within the context of globalization that commercial law reforms do—that as a familiar form to many Westernized nations it can attract foreign investors, which will lead to economic growth and general greater social welfare for the societies in which it is being implemented.⁵⁰ As there is often a shortage of institutions and professionals to administer justice in Third World nations and developing economies, ADR has also been championed as having the ability to decongest these court systems, alleviating the case load pressure and allowing greater access to justice as a whole.⁵¹ Realizing that cultural rejection and misunderstanding of wholesale law transplants can lead to their failure, ADR has often been seen as a way to advocate a “blend[ing] [of] Western and local law,”⁵² thus attempting to avoid criticisms of neocolonialism.⁵³

However, as was a continuing problem mentioned in Part II when discussing the failure of developing legal systems to adopt formalized Western laws and institutions, despite some examples demonstrating success stories in this blending of local and Western laws using ADR procedures,⁵⁴ to a large extent they have also been an ostensible failure in many instances from the outset.⁵⁵ Even with “numerous campaigns highlight[ing] . . . the benefits of the modern, cost-efficient, and transparent mechanisms now available to business disputants, members of the business community did not

49. Manuel A. Gomez, *All in the Family: The Influence of Social Networks on Dispute Processing (A Case Study of a Developing Economy)*, 36 GA. J. INT'L & COMP. L. 291, 300 (2008) (“[S]ocio-legal scholars generally believed that individuals from less developed, collectivistic, or preliterate societies tend to prefer non-confrontational methods that reinforce social harmony, like mediation.”).

50. *Id.* at 295.

51. *See id.*

52. Alessandro Simoni & Richard W. Whitecross, *Gross National Happiness and the Heavenly Stream of Justice: Modernization and Dispute Resolution in the Kingdom of Bhutan*, 55 AM. J. COMP. L. 165, 167 (2007).

53. Nader, *supra* note 8, at 304.

54. *See generally* Simoni & Whitecross, *supra* note 52. However, bear in mind that the authors go out of their way to point to Bhutan as a special and “unique” case. *Id.* at 169-73.

55. Nader, *supra* note 8, at 300 (stating that “[the ADR] movement has had little success internationally”) (quoting Y. DEZALAY & B. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996)).

embrace these new mechanisms.”⁵⁶ Instead they preferred to conduct business as usual, outside of formalized institutions and the attempts at informal procedures.⁵⁷

The major criticism and flaw cited in the inability to transpose Western law onto non-Western societies appears to be the same flaw with implementing Westernized dispute resolution procedures. It again seems to be an issue of culture. Where anthropologists and legal scholars saw systems more conducive to forms of alternative dispute resolution such as mediation and negotiation, they have been criticized for failing to see why the original, native systems worked in the first place.⁵⁸ Western ADR seeks to find impartial advisers to negotiate and mediate settlements between two parties, while in many of the instances where such systems were attempted to be implemented, the cultural custom was to use mediators and negotiators not trained in any particular style, and who were not impartial.⁵⁹ Instead, it was the use of respected elders in the community, with absolutely no formal training, who sought to find a harmonious balance that was not always between two or more parties, but with the community as a whole.⁶⁰ In many places, the cultural understanding of disputes was based upon their impact on communities, and it was the ties to these communities that dictated who resolved them, how that resolution was sought, and who was to determine what that resolution might be.⁶¹

B. THE NEOCOLONIAL CRITICISM OF ADR EXPORTATION

Proponents of the Western style of ADR often trumpet its ability to create win/win solutions, as opposed to the win/lose found in resolution processes like litigation; that it is value free; and that it “replaces confrontation with harmony and consensus.”⁶² However, critics have begun to see ADR not as the efficient, cost effective, preserver of access to justice, but as a means of pacification and control over those trying to assert

56. Gomez, *supra* note 49, at 294.

57. *Id.* (stating that “[b]usiness parties continued processing most of their disputes in the same ways they did before the judicial reform craze”).

58. Nader & Grande, *supra* note 13, at 578.

59. *Id.* at 578-79.

60. *Id.* (using Africa as an example, stating that in contrast to Western or American ADR procedures “African communities use mediators informally trained through ‘life experience,’ who are known to the disputants, are not expected to be neutral, and operate collectively within a council of elders in a public setting”).

61. *Id.* at 579.

62. Nader, *supra* note 8, at 309.

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economic and political rights.⁶³ They often point to the fact that the typical Western style of ADR when employed at home and abroad, keeps settlements and decisions private, as opposed to the public exposure of a trial or other court proceeding.⁶⁴ In this way, it exchanges political rights for an economic bottom line.⁶⁵ Particularly in the Third World, disputes resolved behind closed doors run the risk of partiality. While proponents of ADR are quick to point out that court systems can benefit the economically powerful because of their ability to gain better legal counsel and use their finances to draw out the process, the fact is that the same is true during processes such as negotiation.⁶⁶ Where a court proceeding allows for a public display and an appeals process that might expose corruption in the event of a miscarriage of justice, ADR procedures generally do not.⁶⁷ In areas of the world where there are concerns of corrupt government and a corrupt judiciary, the same concerns are likely to be applicable to extra-judicial processes.⁶⁸ Since the beginning of the ADR revolution and throughout its global application through the past few decades, the general trend of parties in international disputes, when choosing a dispute resolution forum, has been for those of greater political and economic power to choose forums outside of traditional litigation processes, while weaker parties prefer more formalized proceedings when available.⁶⁹ Just as with the concept of rule of law and legal transplants, this has begun to raise questions regarding who ADR is meant to benefit.⁷⁰

63. *Id.* at 308 (stating that “harmony law models are often coercive mechanisms of control”).

64. *Id.* at 309 (“ADR is also often mandated or binding, hidden from public view, and disallowing of appeal to the courts in cases involving work, health, consumer contracts and more.”).

65. *Id.* at 308 (discussing the preference of ADR by multinationals which “commonly ignore the public interest in favor of the bottom line”).

66. Nader & Grande, *supra* note 13, at 581 (describing how “without the possibility of third-party decision-makers, the more powerful disputant can use ADR negotiation to greater advantage”). Nader & Grande go on to state that:

[M]andatory mediation abridges freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view. In spite of growing awareness of consequences, ADR ideology is intact and diffusing worldwide, in hegemonic splendor.

Id. at 585.

67. Nader, *supra* note 8, at 309.

68. See Mohan & Holland, *supra* note 29. Mohan and Holland discuss the general problems of corruption in East African court systems. *Id.*

69. Nader, *supra* note 8, at 310 (citing KENNETH DAM, THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION 356 (1970)).

70. Nader & Grande, *supra* note 13, at 577.

The rejection of ADR models in the Third World has been characterized as a result from the perception that they are “the hegemony of neoliberal concepts of economic relations structured very much in the American style;” instead of being the harmonious marriage of local culture and reliable methods of governing the resolution of disputes.⁷¹ Rather than helping transition legal systems into modernity, ADR may be used to undermine the system in place, and move entire societies “down the slippery slope to lawlessness.”⁷²

C. *The Tradition of ADR in Africa*

Before delving into the current use of ADR in Uganda, it is important to have a brief understanding of the history of legal developments in Sub-Saharan Africa in general, as well as East Africa specifically. As noted in the introduction to this article, Africa has often served as a prime example of postcolonial development and neocolonial criticism with regard to its treatment by Western powers.⁷³ This is also true when looking at it through a legal development perspective.⁷⁴ Generally, the African continent was colonized by imperial powers, and then nations were formed based upon those same divisions once the powers either relinquished control, or were removed.⁷⁵ In a very basic sense, these areas operated under the control of customary law on a local level, were colonized and influenced by the law of their colonizers, then in order to enter the modern political arena and global marketplace, typically adopted that style of Western law, whether it be civil law, such as the adaptation of French law in Rwanda, or British common law in places like Uganda.⁷⁶ The nations in Africa are therefore governed by

71. Nader, *supra* note 8, at 305.

72. *Id.* at 308.

73. See generally NKUMAH, *supra* note 5. In his seminal work on neocolonialism, Nkrumah first begins by describing the subject broadly with a number of examples, but focuses on Africa as a prime and modern instance which highlights and illustrates how neocolonialism establishes itself, as well as the means by which it exerts its influence. See *id.*

74. See Nader & Grande, *supra* note 13, at 577-90 (describing generally the role of power and its impact on legal development in the Horn of Africa).

75. MINNEH KANE ET AL., REASSESSING CUSTOMARY LAW SYSTEMS AS A VEHICLE FOR PROVIDING EQUITABLE ACCESS TO JUSTICE FOR THE POOR, <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf> (paper produced for the World Bank conference “New Frontiers of Social Policy: Development in a Globalizing World”).

76. See U.S. Department of State Background Note: Uganda, <http://www.state.gov/r/pa/ei/bgn/2963.htm> (last visited Mar. 29, 2010); U.S. Department of State Background Note: Rwanda, <http://www.state.gov/r/pa/ei/bgn/2861.htm> (last visited Mar. 29, 2010); see also Republic of Uganda: Ministry of Justice, <http://www.justice.go.ug/jlos.htm> (last visited Mar. 29, 2010).

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adopted legal transplants and often seek some kind of integration between them and their indigenous customary law.⁷⁷

Looking historically, the modern ADR revolution is not the first time that ADR has been used in East Africa. As noted above, forms of alternative dispute resolution have been used on a local level by African villages, clans, and tribes since before the arrival of European imperialists.⁷⁸ This was usually an informal style governed by elders who sought to resolve disputes by restoring relationships within the community.⁷⁹ Once the Europeans arrived, a second style of ADR began to be implemented in areas of the countryside that were not necessarily under the direct control of the colonizers.⁸⁰ Areas under direct control typically had their own versions of the same court systems established in the home countries of the Western powers.⁸¹ Where setting up infrastructure was difficult, Christian missionaries played a role in introducing kinds of “harmony legal model[s]” based upon English procedural law, but also drawing heavily from “Christian rules of behavior” found in Bible scriptures.⁸² In a way similar to the modern ADR movement that seeks a kind of global uniformity, Christian missionaries in Africa began to replace the local dispute resolution structure, which often varied from village to village, with one that was more consistent and more European.⁸³

As colonialism began to wane, there was a belief that to become more civilized, the African “savages” needed to be educated in Western rule of law in order to govern themselves properly once they attained

77. See Nader & Grande, *supra* note 13, at 586.

78. *Id.* at 578-79.

79. *Id.*

80. EVELYN B. EDROMA, SECTOR WIDE APPROACH IN JUSTICE LAW AND ORDER: THE UGANDA EXPERIENCE (2005), available at http://www.doj.gov.za/alraesa/conferences/papers/ent_s2_edroma.pdf (presented at the Annual Conference on Fusion of Legal Systems and Concepts in Africa).

81. *Id.* at 3.

82. Nader & Grande, *supra* note 13, at 578-79 (“Western Christianity spread the harmony legal model in a manner that resembles the modern ADR movement. Both emphasized compromise and consensus as a preferred way of decision making—peace over justice being a mandatory result.”).

83. *Id.* (“Missionaries carried forward the ‘civilizing mission’ in two ways: by teaching the ‘savages’ about peaceful resolution of conflict through law courts, and by teaching them the rules of a good Christian life.”). Examples of a Christian way of life being things such “turning the other cheek” which Nader and Grande equate to “acquiescence, or the opposite of militancy” which “supports the political agenda of colonialism” by pacifying regions that might otherwise rebel. *Id.*

independence.⁸⁴ As discussed in Part II, decolonization came with the desire to leave Western law behind, with a legal, formalized, institutional infrastructure.⁸⁵ In this way, the development of laws within East Africa can be seen as a layering effect, which is important to understand when considering the current state and attempts to integrate Western style ADR.⁸⁶ In short, legal tradition in these now post or neocolonial states began with a kind of local customary law, which was supplanted by an imperial rule of law and a broader, Christian-based law.⁸⁷ The new nations were then expected to develop and create modernized legal court systems, that while still in their infancy, are being replaced by yet another form of informal dispute resolution structure.⁸⁸ The fervor with which this new wave of alternative dispute resolution has been funded and pushed into these developing legal systems has been likened to the kind Christian missionaries used when replacing customary tribal law with one based on an external religious tradition.⁸⁹ Suddenly, the style of justice they were told was necessary for a civilized society is being undermined by the ADR revolution.⁹⁰ Where not that long ago the formal and structured was the hallmark of civilization, before it could fully take root, Third World nations are now being told that it is the opposite.⁹¹

IV. LAW REFORM AND THE DEVELOPMENT OF ADR USE IN THE UGANDAN LEGAL SYSTEM

As is true with many postcolonial African nations, the pre-colonial system of law in Uganda was primarily rooted in local custom, which ranged from region to region, and often village to village.⁹² To a degree, this same system survives in the form of Local Council Courts (LCCs) which were initially established as Resistance Council Courts to create a temporary kind of restorative justice during the transition from the dictatorial regimes of Idi

84. Paquin, *supra* note 10, at 346.

85. *Id.*

86. Nader & Grande, *supra* note 13, at 585-86 (Nader & Grande describe how the law in the Horn of Africa First "is made of legal 'layers' imposed one on the other in the course of history").

87. *Id.* The authors do point to other layers that have been left out of this paper for the sake of relevancy, such as the layer of Islamic law in countries like Somalia. *Id.*

88. *See id.* at 587-90.

89. *Id.* at 577-80.

90. *Id.* at 589-90. Nader and Grande conclude their article by stating that "U.S. style alternative dispute resolution is being imposed on many unwilling recipients in foreign countries as a requirement for development aid whether they are appropriate or not for the local context" *Id.* at 591.

91. *Id.* at 589-90.

92. *Id.* at 578-79.

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Amin and Milton Obote in 1985.⁹³ LCCs provided a stabilizing effect for the nation after decades of injustice and suffering, and served to restore individual citizens' faith in fair and equitable treatment under the law.⁹⁴ Even though they began as a form of transitional justice, in 1986 they were officially brought into the judicial branch, and have continued to provide an "on the ground" form of law in areas lacking in formalized institutions and judicial presence.⁹⁵ However, like most postcolonial African nations, Uganda has also adopted a Westernized rule of law in the form of British common law.⁹⁶ Being a former British colony made this a natural transition.⁹⁷ This postcolonial influence was further exemplified by the creation of Uganda's Commercial Division of the High Court in the late 1990s, which was modeled after the British version.⁹⁸ Over the past decade there has also been an attempt to institute a series of ADR reforms based on the Anglo-American style.⁹⁹ More and more young lawyers are being trained in Western negotiation and mediation styles.¹⁰⁰ These reforms have mostly been applied to the Commercial Court, which has acted as a proving ground for legal innovations.¹⁰¹

The presence of both customary and Westernized ADR methods, albeit on different levels, as well as its transplantation of legal concepts from Great Britain, make Uganda a prime example of the transition for Third World nations and economies from their developing stages into a modern and global marketplace. The final two parts to this article will provide a basic understanding of the development of each system—the formalized court,

93. KANE ET AL., *supra* note 75, at 6-9.

94. *Id.*

95. *Id.*

96. Edroma, *supra* note 80, at 1 (noting that "[t]he principles of English common law (including doctrines of equity) were also applied and when Uganda gained her independence in 1962, [British common law] was still enforced . . .").

97. *Id.*

98. Justice Geoffrey Kiryabwire, *The Development of the Commercial Court System in Uganda: A Study of the Commercial Court Division, High Court of Uganda*, 2 J. BUS. ENTREP. & L. 349, 352 (2009). Justice Kiryabwire sits on the Commercial Court Division of the Ugandan High Court. *Id.* at 349 n.1.

99. *See id.* at 353.

100. Samuel O. Mantaw, *Legal Education in Africa: What Type of Lawyer Does Africa Need?*, 39 MCGEORGE L. REV. 903 (2008) (noting that ADR is an important part to the legal training and development of lawyers in Africa in general in order to modernize the legal systems).

101. *See* Kiryabwire, *supra* note 98, at 353. The reforms introduced at the Commercial Court in Uganda include a pre-trial management process, the use of court-mandated mediation, and the use of technology still unavailable in most Ugandan courts. *Id.*

Westernized ADR, and the informal LCCs—and examine possible explanations for the difficulties inherent in each, including their incentives and drawbacks. Finally, Part V will consider whether a legal, evolutionary synthesis is possible.

A. *The Successes and Failures of Commercial Legal Reform in Uganda*

The development and reformation of commercial justice in Uganda reflect many of the problems illustrated in the preceding sections. At the level of formal transplanted institutions, there is a lack of properly trained and significantly specialized legal minds that understand and can address the laws as they currently stand.¹⁰² With new investment in the mediation of commercial disputes, there is a measurable amount of mistrust among the parties entering into it.¹⁰³ This can be attributed to skeptical attitudes of the system brought on by the legal layering effect¹⁰⁴ and changing of reform strategies imported by the West, a shortage of trained and respected mediators, as well as a general problem of education regarding the methods of the system.¹⁰⁵

1. The Commercial Court

In the early to mid 1990s, a liberalizing of policies in Uganda led to increased commercial activity in the private sector, which in turn led to increasing dissatisfaction with the judiciary's ability to handle the specialized nature of the ever growing number of commercial disputes.¹⁰⁶ As a former British colony, and having adopted the British common law tradition, it was only natural for Uganda to adopt a British solution. The idea of a specific commercial docket was not new, one having been in existence in England since 1895,¹⁰⁷ and such institutions had been adopted

102. Edroma, *supra* note 80, at 4.

103. *Id.* at 14 (stating that “legal practitioners regard mediation as another unnecessary step in the legal process and because CADER uses recent law graduates as mediators, they are not trusted and do not command the necessary respect from senior practitioners”). It has also been speculated that lawyers are generally wary of mediation because they fear it might cut into their earnings if cases are settled earlier. 1 ALLEN ASIIMWE ET AL., JUSTICE, LAW AND ORDER SECTOR STRATEGIC INVESTMENT PLAN: MID-TERM EVALUATION 2001/2 – 2005/6, at 47 (2004), available at http://www.ihrnetwork.org/files/Uganda_JLOS_MTE_Vol_One.pdf.

104. See *supra* Part III.C for a general discussion of the layering effect of laws in Africa. See also Nader & Grande, *supra* note 13, at 585-86.

105. Edroma, *supra* note 103, at 14.

106. Kiryabwire, *supra* note 98, at 352.

107. *Id.* at 350.

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by a number of other African states and former British colonies.¹⁰⁸ In 1996, the statutory provision creating the Commercial Division of the High Court was first introduced in the form of a legal notice, stating in part that, “[I]t has been decided to establish, a Commercial Court capable of delivering to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life in Uganda”¹⁰⁹ However, despite the best intentions of an “expeditious . . . mode of adjudicat[ion],” a study released in 1999 found that nearly fifty-four percent of participants described case backlog and sluggish results in the Commercial Court to be a considerable problem.¹¹⁰ Major contributing factors include the lack of judges sufficiently trained to adjudicate such disputes, if not a general lack of judges in Uganda as a whole, and the lack of a modernized infrastructure.¹¹¹ At the time of this writing there are four judges available at the Commercial Court.¹¹² In 2007, there was an average of 1,742 cases assigned per judge, all of whom worked without clerks and other support staff typically encountered in Western legal systems.¹¹³ Further complicating the problem for commercial disputants in Uganda is the small number of attorneys who specialize in commercial law.¹¹⁴ At the moment, although the need for reform has been recognized, Ugandan attorneys are trained with a broad and

108. *Id.* at 351. See also WORLD BANK, DOING BUSINESS 2009 51-52 (2009), available at <http://www.doingbusiness.org/Downloads> (describing the creation of specialized commercial courts as the most popular reform in the African business sector over the last five years, and noting that such courts have developed in Kenya, Tanzania, Madagascar, and others).

109. Kiryabwire, *supra* note 98, at 352 (quoting then Chief Justice W.W. Wambuzi from Legal Notice No. 5 of 1996) (alterations in original).

110. GEOFFREY W.M. KIRYABWIRE, MEDIATION OF CORPORATE GOVERNANCE DISPUTES THROUGH COURT ANNEXED MEDIATION 2-3 (2007), [http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Mediating_Corp_Gov_Disputes_ADR_Uganda/\\$FILE/Geoffrey+paper+-+Paris+2.pdf](http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Mediating_Corp_Gov_Disputes_ADR_Uganda/$FILE/Geoffrey+paper+-+Paris+2.pdf) (report presented to the Global Corporate Governance Forum on Mediating Corporate Governance Disputes at the World Bank Paris office).

111. ASIIMWE ET AL., *supra* note 103, at 44. The 1999 study having been designed to address and expand upon a 1998 survey which found “poor court facilities, limited capacity of the judges . . . [and] limited use . . . of Alternative Dispute Resolution mechanisms” to be of concern to participants in the commercial sector. *Id.*

112. Kiryabwire, *supra* note 98, at 354.

113. *Id.* at 354-55.

114. See Edroma, *supra* note 80, at 4 (“For long, the effect of University law programs in Uganda in practical terms qualifies lawyers for limited practice. . . . [E]xpertise . . . is minimal because of the generality in the legal education.”).

non-specific legal background, resulting in relatively few that understand the nuances of commercial litigation.¹¹⁵

The decision process that led to the creation of the Ugandan Commercial Court began on the heels of the rule of law revival in the 1980s, and its hopes and complications typify that method of legal reform. It is essentially the creation of an institution, based on a foreign model, and rooted in “good law.”¹¹⁶ The hope was that such a model would disseminate from the top in a kind of trickle-down effect, shaping law across the country.¹¹⁷ However, one of the prime reasons given for transplanting legal concepts and institutions has often been the lack of legal minds necessary to go through the arduous process of developing homegrown laws.¹¹⁸ As a real world example, Uganda demonstrates how one of the very reasons suggested to necessitate the kind of formalization used in the rule of law doctrine can cause significant hindrances in its implementation. In seeking a solution to its backlog problems after the 1999 report, Uganda turned to the latest in Western law reform models, the use of alternative dispute resolution, to alleviate the pressure.¹¹⁹

2. CADER and Mandatory Mediation

In 2003, Uganda began a pilot project at the Commercial Court to test the efficiency of sending some cases to compulsory mediation.¹²⁰ These cases were referred to the Centre for Arbitration and Dispute Resolution (CADER),¹²¹ which uses newly trained law graduates as its mediators.¹²²

115. *Id.* With regard to modernizing the Ugandan legal curricula in universities, Edroma believes that:

[A]ll law schools should . . . endeavor to ensure that students acquire skills appropriate to the efficient and effective practice of law. . . . The law schools today also face the challenge of implementing major changes to ensure that they keep pace with domestic, regional and global trends.

Id.

116. See *supra* text accompanying notes 13-23 for a basic description of these aspects as they apply to rule of law and legal reform.

117. See *supra* text accompanying note 29.

118. Paquin, *supra* note 10, at 339 (describing how such legal minds are “often in short supply”).

119. KIRYABWIRE, *supra* note 110, at 6 (“[T]he 1999 Uganda Commercial Justice Sector Study specifically recommended the use of ADR in commercial cases and to lobby funding from international donors in order to subsidize its use in the courts.”).

120. *Id.* at 7.

121. The Centre for Arbitration and Dispute Resolution first came into existence in Uganda in 2000, mostly for the use of arbitration, as it was seen as faster and more cost effective way of reaching decisions. ASIIMWE ET AL., *supra* note 103, at 46. Attached to the Commercial Court, it has helped create a “multi door courthouse” allowing parties to pursue multiple means of settling

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The decisions reached in mediation were made legally binding by court orders.¹²³

The historical tendency in Uganda has been to litigate commercial disputes,¹²⁴ which may explain why court-ordered mandatory mediation was necessary. The underlying resistance may be attributed to the historical layering effect of legal reforms in Uganda. The argument is that after years of reforms teaching the rule of law doctrine, and the expectation that a sound litigation-based dispute resolution system with "good law" was the epitome of the modern legal system, participants would necessarily be wary of another reform undermining such a system.¹²⁵ Added to this are concerns about the mediators' experience.¹²⁶ As opposed to having an established judge preside over a dispute, CADER's use of recent law graduates, because of a lack of available personnel properly trained in Western ADR, understandably caused apprehension for a population that has a history of elders and respected community leaders acting in such a role.¹²⁷ Nonetheless, the pilot program saw 450 of 778 cases referred to mediation either discontinued or settled, thus removing them from the trial calendar.¹²⁸ The success of the pilot program promulgated the drafting of mandatory mediation rule for all cases at the Commercial Court in 2007.¹²⁹

their disputes. See Kiryabwire, *supra* note 98, at 353. However, the effectiveness of the Commercial Court has seen a decline in CADER's use as a destination for arbitration. ASIIMWE ET AL., *supra* note 103, at 47. Instead, its use has increased in mediations because of the Commercial Court's pilot mediation project, and eventual mandatory mediation. *Id.*

122. Edroma, *supra* note 80, at 14.

123. KIRYABWIRE, *supra* note 110, at 8.

124. *Id.* at 3.

125. See Nader & Grande, *supra* note 13, at 589-90.

126. ASIIMWE ET AL., *supra* note 103, at 48.

127. Compare KIRYABWIRE, *supra* note 110, at 3 (describing the Ugandan tradition in the pre-modern era as one where there existed for centuries a customary mediation mechanism "using elders as conciliators/mediators in disputes using procedures acceptable to the local community but which were not as formal as those found in the courts"), with ASIIMWE ET AL., *supra* note 103, at 48 (noting that "[w]hilst [the newly graduated law students] have recent and good training on the process of mediation, they are not necessarily trusted by senior practitioners").

128. KIRYABWIRE, *supra* note 110, at 8.

129. *Id.*

3. Limitations of the Commercial Court and the Mandatory Mediation Program

As stated previously, one of the benefits of implementing alternative dispute resolution mechanisms in the Third World is its potential to decongest overloaded court systems.¹³⁰ In the case of Uganda's Commercial Court, the referral of cases to CADER has proven its ability to do so. Both the institutional law reforms of the rule of law revival and the implementation of ADR seek to modernize court systems with the goal of enhancing nations' access to the global market.¹³¹ With Uganda, the direct impact of the Commercial Court can be seen in the "Enforcement of Contracts" factor calculated in the World Bank's Ease of Doing Business Index.¹³² While Uganda saw an overall slip from 2008 to 2009, dropping from 105 to 111, its ranking for the enforcement of contracts increased to 117, surpassing even some Western nations.¹³³ It is hoped that the improvement of a reliable legal system where contract disputes have predictable results will help boost business at home as well as investment from abroad.¹³⁴

However, while mandatory mediation has helped alleviate the case load of the four judges at the Commercial Court by ensuring that some of the 1,742 cases they may face this year are settled before consuming trial time, the issues regarding a lack of trust in the system and the mediators will most likely remain until the newly graduated law students have become older and more respected in the community.¹³⁵ In this way, the instituting of this ADR

130. See Gomez, *supra* note 49, at 295.

131. Compare *id.* (detailing the believed benefits of ADR development for entry in the global marketplace), with Paquin, *supra* note 10, at 339-40 (describing the need for readily understandable legal institutions to achieve the objective of creating bigger markets by involving more investors).

132. Kiryabwire, *supra* note 98, at 357. "A high ranking [with first place being the best] on the ease of doing business index means the regulatory environment is conducive to the operation of business." World Bank, Doing Business Economy Rankings, <http://www.doingbusiness.org/economyrankings> (last visited Mar. 29, 2010). More detailed information can be found as to how the rankings are calculated by clicking on the "ranking methodology" link. *Id.*

133. Kiryabwire, *supra* note 98, at 357. See also World Bank, Doing Business Custom Query, <http://www.doingbusiness.org/CustomQuery> (last visited Mar. 29, 2010) (check boxes for country and year to chart progress).

134. See Kiryabwire, *supra* note 98, at 357-58. Justice Kiryabwire quotes positive reviews from different organizations commending the Commercial Court's progress in making Uganda a marketable investment destination, including one from the International Finance Corporation stating that, "[I]n Tanzania and Uganda, Judicial dispute resolution has been streamlined recently and is now more efficient than in many industrialized countries." *Id.* at 358.

135. ASIIMWE ET AL., *supra* note 103, at 48. The authors conclude that while alternatives to the use of the young mediators have been discussed, the process of training and waiting for mediators to

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reform has moved away from some of the basic reasons for using dispute resolution in developing systems. Namely, rather than creating a modernizing and synthesizing harmony legal model, it imposes a new reform which is expected to disseminate over time until it gains acceptance with the larger population.

Additionally, from a neocolonialist perspective, it is important to look at who is benefiting from the reforms being made in Ugandan commercial law. The Commercial Court hears cases related to intellectual property, bankruptcy, corporate governance, and traditional contract claims.¹³⁶ However, the court currently only operates out of the capital city of Kampala, and the threshold for accessing the court is five million Ugandan shillings.¹³⁷ This is roughly 2,506 USD,¹³⁸ while the average Ugandan earns an income of only 1,100 USD a year.¹³⁹ This unfortunately ensures that only a small portion of the nation's population has access to these new commercial reforms either by financial or geographic restriction.¹⁴⁰ While it may be of benefit to foreign investors and large to medium-sized businesses, the Commercial Court has little impact on the average Ugandan.

B. *The LCCs*

The geographic and financial threshold limitations, as well as case backlog resulting in delays, necessarily cause commercial disputants to find other avenues in seeking resolution to their disputes. Ideally, these cases

become senior practitioners, or at the very least more respected, is only a solution in the long term, and cannot resolve difficulties inherent in the process now. *Id.*

136. Uganda Judiciary, Commercial High Court Homepage, http://www.judicature.go.ug/index.php?option=com_content&task=view&id=91&Itemid=142 (last visited Mar. 29, 2010).

137. ASIIMWE ET AL., *supra* note 103, at 49-50. It should be noted that authors also indicate that some larger investors consider the threshold too low, because it allows for some ordinary debt claims to come through what they feel is a specialized court designed for only larger disputes. *Id.* This jurisdictional problem of what suits should be handled by the Commercial Court, and how to handle suits below that threshold, is under review in Uganda. *Id.*

138. Conversion rates based on March 2009 tables.

139. United States Central Intelligence Agency, World Factbook: Uganda, <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> (last visited Mar. 29, 2010). The figure provided is based on Uganda's gross domestic product per capita, found in the "Economy" section of the webpage.

140. ASIIMWE ET AL., *supra* note 103, at 49-51.

would be handled at the Magistrate level¹⁴¹ of Uganda's judicial system, but the reality is that the convenience of LCCs has led many in the business sector to seek results on a more local level.¹⁴² LCCs operate in a three-tiered system, with review of judgments escalating up the tiers.¹⁴³ LC I courts typically consist of elected members from the local community.¹⁴⁴ LC II and III courts are formed in the same manner at the parish and sub-county level, respectively.¹⁴⁵ Moreover "[s]uits in an LC court may be instituted verbally by stating the nature of the claim to the Chairperson of the council who then reduces it into writing."¹⁴⁶

The current jurisdiction of LCCs is technically limited to land disputes, customary tenure, family matters, and criminal cases involving children.¹⁴⁷ They are allowed to issue judgments and orders of "reconciliation, declarations, compensation, apology, and caution."¹⁴⁸ Monetary judgments valued over 5,000 Ugandan shillings may be given, but must be executed by a Magistrate court. However, it is apparent that LCCs often overstep their jurisdictional bounds, as a resounding majority of medium to large business disputants in a 2004 survey stated they felt they had more readily available access to LCCs than Uganda's formal court system.¹⁴⁹ As the LCCs are typically the first recourse for the poor in Uganda, it is apparent that they often fill the gaps left by both the geographic and pecuniary restrictions on the Commercial High Court.¹⁵⁰

141. See Brenda Mahoro, *The Ugandan Legal System and Legal Sector* (2006), <http://www.nyulawglobal.org/globalex/uganda.htm> (last visited Mar. 29, 2010). The Magistrate Courts are the initial level in the formal Ugandan legal system. *Id.* They operate on a tiered system, reviewable up the tiers, with final review going directly to the High Court. *Id.* See also Uganda Judiciary, Court System, http://www.judicature.go.ug/index.php?option=com_content&task=view&id=55&Itemid=99 (last visited Mar. 29, 2010) (using the left hand guide, scroll over Court System to access descriptions of the different court levels).

142. See KIRYABWIRE, *supra* note 110, at 4.

143. See KANE ET AL., *supra* note 75, at 8. In 2005, the Ugandan LC system consisted of 953 LC III courts; 5,225 LC II courts; and 44,402 courts at the LC I level. *Id.*

144. *Id.*

145. *Id.*

146. See *id.*

147. *Id.* at 7.

148. *Id.*

149. See KIRYABWIRE, *supra* note 110, at 4. The survey was conducted by the Commercial Justice Reform Programme, finding that fifty nine percent of formal businesses surveyed felt the LCCs were the most readily accessible dispute resolution system in the country, as opposed to only twenty seven percent for the Commercial Court. *Id.*

150. See KANE ET AL., *supra* note 75, at 7.

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1. Benefits of the LCC System

In general, LCCs in Uganda are simpler, more readily accessible, cheaper, and issue judgments much more quickly than the formal court system.¹⁵¹ With more than 50,000 courts¹⁵² across the country, it is far easier to register a complaint with an LCC than make the trek to the capital city of Kampala, or even a lower Magistrate Court, particularly in a Third World country where travel is less reliable.¹⁵³ By law, attorneys are barred from appearing at LCCs, which keeps the cost of the dispute relatively low.¹⁵⁴ The elders on the LCC also issue judgments quickly, as opposed to the process in the formal courts which can be drawn out for years given the current state of backlog.¹⁵⁵ Furthermore, while formal judicial proceedings in Uganda are held in English, LCCs use the languages spoken by the local tribes.¹⁵⁶ The procedures in these tribunals “tend to be simple and clear,” requiring no technical legal knowledge.¹⁵⁷

Perhaps most importantly, LCCs provide Ugandans with a sense of ownership in their legal system.¹⁵⁸ Being able to speak their own language, with local elders who understand their specific customs and traditions, allows them to participate and feel that true justice has been achieved.¹⁵⁹ Since their beginning as a form of restorative justice during the recovery period after the regimes of Idi Amin and Milton Obote, the LCCs have served as a stabilizing force and earned an amount of credibility as a uniquely Ugandan justice system, as opposed to one imported by a former colonizer or economic power.

151. *Id.* at 9-11 (discussing the strengths of customary tribunals, including LCCs, in Sierra Leone and Uganda).

152. *Id.* at 8 (finding 44,402 LC I courts; 5,225 LC II; and 953 LC III).

153. See U.S. Department of State, Uganda: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1051.html (last visited Mar. 29, 2010) (noting that infrastructure is limited in areas outside of Kampala, as well as road and traffic conditions).

154. See KANE ET AL., *supra* note 75, at 7.

155. See Kiryabwire, *supra* note 98, at 355-56. The graphs show that while there has been improvement, as of 2007 thirty-nine percent of civil cases in Uganda's Commercial Court were more than two years old. *Id.*

156. KANE ET AL., *supra* note 75, at 8.

157. *Id.* at 10.

158. *Id.* at 10-11.

159. See *id.* (noting that LCCs have allowed for greater participation of minority groups in government and in the justice system as a whole).

2. Deficiencies in the LCC System

Some of the LCCs' greatest draws also serve as their largest inherent problems. The abundance of courts means they are generally underfunded, undertrained, and unsupervised. Judgments are also not recorded, so it is difficult to review them, or check them for consistency.¹⁶⁰ While the familiarity with local custom and language offers a sense of comfort and ease for people within a certain community, the growing marketplace will inevitably cause occurrences where disputants are from different regions, speak different languages, and have different customs.¹⁶¹

Additionally, a common criticism lobbied against LCCs is their predilection for discrimination and bias against ethnic minorities and women.¹⁶² Uganda attempted to deal with this by mandating that such groups be represented on LCC tribunals, and even made it a constitutional requirement that one-third of all LCC members be women.¹⁶³ "However, indications are that mandating representation is necessary, but not sufficient to end discrimination"¹⁶⁴ Unfortunately, most likely because of the lack of record keeping, there is inadequate data to truly understand the extent to which discrimination plays a role in LCC decisions.¹⁶⁵

V. SYNTHESIS AND AN ADR SMALL CLAIMS PROCEDURE AS A POTENTIAL SOLUTION

A. Revisiting the Problems

There are clear problems with the current handling of business disputes in the Ugandan legal system from top to bottom. The institution of a better rule of law by creating the Commercial Division of the High Court has been a step in the right direction toward achieving the goal of securing Uganda a place in the global market by being attractive and useful for large to medium-sized businesses and foreign investors.¹⁶⁶ While benefiting the

160. *Id.* at 12-13.

161. *See id.* at 14-15. The authors discuss transcommunity issues in regard to conflicts such as civil wars, but the same issues are likely to appear in any dispute regarding parties without the same customary background. *See id.*

162. *Id.* at 13-14.

163. *Id.* at 13.

164. *Id.*

165. *See id.* at 11, 13.

166. Kiryabwire, *supra* note 98, at 357-58 (relating positive reviews of the court's impact and its standing as assessed by the World Bank in enforcement of contracts).

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economically powerful, however, the lack of understanding and familiarity with its legal structure on the part of the average citizen, as well as restriction on its access and high case load, have limited its effectiveness in Uganda as a whole.¹⁶⁷ The transplantation of this legal concept from a foreign system also deprives Ugandan society of the kind of ownership found in the LCCs.¹⁶⁸

The same can be said for the new use of Western mediation styles to help manage the backlogging problems in the Commercial Court. The other major issue for the importation of these ADR procedures is the distrust of its participants regarding the young mediators.¹⁶⁹ This issue will not only result in a long process of waiting for them to earn respect, but it also ignores the cultural understanding of most Ugandans that elders belong in such roles.¹⁷⁰ The imposition of foreign mechanisms of justice while sidestepping cultural history and turning a blind eye to the impact on the average Ugandan, is likely to lead to a perception of neocolonialism from within and without Uganda, creating increased dissatisfaction with the justice system.

As for the homegrown justice of the LCCs by themselves, acting in the capacity they are now, whether that be overstepping their jurisdiction or not, are unable to reliably ensure consistent justice for every Ugandan in the realm of commercial disputes.¹⁷¹

Furthermore, there is a relative problem of cohesion within the system. If Uganda is to truly participate in the global marketplace, it should not only be inviting to large foreign investors, but have the capacity to create them itself. For a company with a worldwide presence like Coca-Cola to be developed from the ground up in Uganda, it would more than likely have to deal with three different dispute resolution mechanisms as it grows. First, as a small company just starting out, it would deal on a local level with the informal and customary practices of the LCCs.¹⁷² As it expands, with the

167. ASIIMWE ET AL., *supra* note 103, at 49-51.

168. See KANE ET AL., *supra* note 75, at 10-11.

169. ASIIMWE ET AL., *supra* note 103, at 48 (noting that "whilst [the newly graduated law students] have recent and good training on the process of mediation, they are not necessarily trusted by senior practitioners.").

170. *Id.* (concluding that the training of young law students is a long-term solution, as opposed to an immediate one); KIRYABWIRE, *supra* note 110, at 3 (relating that historically elders have served as "conciliators/mediators" in Uganda).

171. KANE ET AL., *supra* note 75, at 11-13 (listing weaknesses in Customary tribunals as being, among other things, a lack of adequate training and supervision, discrimination against certain parties, a lack of record keeping, and difficulties dealing with transcommunity disputes).

172. See KIRYABWIRE, *supra* note 110, at 4; see also KANE ET AL., *supra* note 75, at 7.

ability to afford attorneys, it would find its way to Magistrate Courts enforcing more formalized commercial law, but by judges who are unlikely to have specialized knowledge in the field.¹⁷³ Lastly, as it grows to national prominence, it would come to the Commercial Court and encounter mandatory mediation based on Western models for the first time before formally coming before a judge.

Some of these problems are recognized by the Ugandan government, and potential solutions are being considered.¹⁷⁴ First, there is the expansion of the Commercial Court into more than one courthouse, or alternatively, and possibly in addition to, circuit courts set up around the country.¹⁷⁵ The difficulty with this solution is the reality of funding in Uganda, and the logistics of construction.¹⁷⁶ Given the amount of time and money it took to move from the idea to the creation of the current Commercial Court, it is unlikely that this is a realistic solution for the time being.¹⁷⁷ Furthermore, it fails to resolve the problem with lack of ownership, and understanding on behalf of the Ugandan people. The second possibility is the institution of a kind of small claims procedure.¹⁷⁸ If done with consideration of all the inherent problems in the Ugandan commercial law system, it is likely to have a far greater chance of success.

B. Suggestions for Implementing a Small Claims Procedure

Small claims courts have long been in operation in the United States and other jurisdictions. As the name suggests, they are typically used to adjudicate claims of little financial value that can be resolved quickly.¹⁷⁹ However, when considering the desire for ownership, as well as the inherent problems of training, funding, and building in Uganda, the wholesale legal

173. See ASIIMWE ET AL., *supra* note 103, at 44. The authors point out the lack of capacity of judges in handling disputes at the High Court level, which makes it likely that the problem is even greater in the lower courts.

174. *Id.* at 49-53 (describing some of the key challenges that remain for the Commercial Court and possible solutions).

175. *Id.* at 51 (discussing proposals of “rolling out” services “up country” and establishing circuit courts).

176. *Id.*

177. See Kiryabwire, *supra* note 98, at 352-54 (noting that the recommendation for creating a Commercial Court was first made in 1995, while the first actually constructed courthouse was not completed until 2008, the year the paper was delivered).

178. ASIIMWE ET AL., *supra* note 103, at 50-51 (suggesting a study be done to investigate the potential use of a small claims court as a means to “fast track” cases to handle them in a timely manner).

179. 20 ANNE M. PAYNE, AMERICAN JURISPRUDENCE: SMALL CLAIMS COURT § 15 (2d ed. 2008).

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transplantation of another institution is unlikely to be effective, particularly in meeting the needs of the people for a cohesive justice system in the short term. Rather than a small claims court, it would be more beneficial for Uganda to institute a small claims *procedure*, relying on mediation, using the tools already available in the current system. A procedure is also more desirable because Ugandan statutory language allows for the Chief Justice to create procedures regulating the efficiency of the court system.¹⁸⁰ Instituting a procedure should eliminate the costly and time consuming steps of creating an entire level of new courts.

As has been discussed above, LCC courts already handle commercial disputes on a regular basis. Rather than expending money to replace a system that is already working, Uganda should use it to its advantage and synthesize it within the higher legal structure. Currently, suits involving simple matters such as debt collection, which could easily be resolved through mediation, instead find their way into the Commercial Court.¹⁸¹ Rather than solely using the trained mediators at the court, Uganda can expand the mediation project by offering some training and giving agreements reached in the LCCs the same authority as granted the mediators at CADER. Uganda could allow the LCCs to continue to resolve small disputes with awards under 5,000 shillings, but also have them double as mediators in simple cases involving more. It should further keep the LCC bar on using attorneys, therefore allowing equal and greater participation for even the poorest Ugandans.

Even if this is done only for LC III courts, it will expand to over 953 different courts throughout the country.¹⁸² By using the elders that sit on these courts, who are already respected in the community, it is more than likely to alleviate the trust issues that attorneys and disputants have expressed with the recent law graduates.¹⁸³

180. CONSTITUTION OF THE REPUBLIC OF UGANDA art. 133(1)(b), *available at* http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf (noting that the Chief Justice “may issue orders and directions to the courts necessary for the proper and efficient administration of justice”).

181. ASIIMWE ET AL., *supra* note 103, at 50 (indicating that eighty percent of cases handled by the Commercial Court “involved straight forward debt collection and other sub categories of contractual disputes”).

182. KANE ET AL., *supra* note 75, at 8.

183. ASIIMWE ET AL., *supra* note 103, at 48 (describing practitioners unease with young mediators); KIRYABWIRE, *supra* note 110, at 3 (noting the Ugandan cultural tradition of elders as mediators of disputes).

Furthermore, by limiting the LCCs to a mediator's role, and issuing consent judgments only on agreements by the parties, there is a smaller likelihood of bias or discrimination because the disputants will have maintained their autonomy and reached the decision themselves.¹⁸⁴ In having the consent judgments issued by the Magistrate courts, it will also create a cohesive chain of commercial decision making from the very top to bottom, increasing the reliability of commercial law in Uganda, and making it more attractive to foreign investors.

VI. CONCLUSION

A small claims procedure instituted by using the well-known and culturally accepted system already in place in Uganda may provide a reliable and efficient rule of law without the neocolonial imposition of a foreign concept or transplant. ADR, in this case mediation, properly used as a synthesizing tool, has the potential to bridge the gap between the kind of law needed to operate in a global marketplace and the type of grass roots justice that works on the ground.

The fervor with which Western ADR is being integrated into other judicial systems should be tempered. While it has great potential, its greatest benefits come when it works with the systems that are currently in place. At the beginning of this article, the question was posed as to whether ADR was just another corporate, neocolonial tool, likening it to water being sold next to soft drinks in Coca-Cola's vending machines. In Uganda, limited resources have resulted in Coke and its products typically being distributed not in plastic bottles through machines, but in glass bottles sold in the refrigerated sections of stores. Rather than being disposed of, the bottles are returned, refilled, and reused.¹⁸⁵ Similarly, ADR can be used to distribute the same product, and help bring nations into the global marketplace, so long as it is adapted to the conditions of where it is being used. The key is to work with what is available already to find a uniquely indigenous solution.

184. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (3d ed. 2003) (stating that mediation by definition is "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative control...").

185. Ecotravel Uganda, Uganda Travel Tips, http://www.ecotraveluganda.com/?jc=Travel_Tips (last visited Mar. 29, 2010).